MINUTES
of the
FIRST MEETING
of the
MINING ACT SUBCOMMITTEE
of the
INDIAN AFFAIRS COMMITTEE

October 30, 2008
Santa Fe, New Mexico

The first meeting of the Mining Act Subcommittee of the Indian Affairs Committee for the 2008 interim was called to order by Representative Patricia A. Lundstrom, chair, at 9:20 a.m. in Room 305 at the State Capitol in Santa Fe.

Present
Rep. Patricia A. Lundstrom, Chair
Sen. Rod Adair
Rep. Ray Begaye
Sen. Lynda M. Lovejoy
Rep. James Roger Madalena
Sen. John Pinto
Sen. David Ulibarri
Rep. Gloria C. Vaughn

Absent
Sen. Richard C. Martinez
Rep. Debbie A. Rodella
Sen. John C. Ryan

Staff
Chase Van Gorder
Damian Lara
Mark Harben

Guests
The guest list is in the meeting file.

Handouts
Copies of all handouts and written testimony are in the meeting file.

<u>Thursday, October 30 — Room 305, State Capitol</u>

Overview of the New Mexico Mining Act

Bill Brancard, director for the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department, provided an overview of the New Mexico Mining Act. Mr. Brancard pointed out that New Mexico was one of the last states to adopt comprehensive mining legislation. Among the substantive contents of the New Mexico Mining Act are the requirements for all mines to be reclaimed, retroactive requirements for past mines with two full years of production between 1970 and 1993, financial assurances, including bonds, public

involvement and robust review of new mines. That act also established three main categories of activity that are regulated: 1) exploration; 2) existing mining operations; and 3) new mining. Permits are issued according to the status of these categories. Exploration permits are for drill holes used to obtain core and mineral samples. These samples are used to identify any reserves or resources in the ground. There are also permits for existing mines and expansion permits for existing mines to continue or expand mining operations. The expansion permits have very similar requirements as the permits for new mining operations, including extensive review and reclamation requirements.

Mr. Brancard stated that the New Mexico Mining Act starts very broadly and then excludes certain mining activities. Specific to uranium mining, Section 3 of that act excludes mining activity under the purview of the Nuclear Regulatory Commission (NRC). Mr. Brancard noted that his agency interpreted that language of the New Mexico Mining Act to mean that only mining operations that received a license from the NRC were exempt. However, the industry took the language to mean that all uranium activities were exempt from that act. Litigation ensued and after six or eight years, a court ruling upheld the interpretation of the agency. The drawback was that companies did not begin reclamation of those mines in question until after the conclusion of the litigation.

Additionally, Mr. Brancard noted that the New Mexico Mining Act was not meant to supersede any other law or agency rules that might impose requirements on mining operations. The Mining and Minerals Division works with other departments, including the Department of Game and Fish, the Cultural Affairs Department and the Department of Environment, to issue permits. The Mining and Minerals Division also integrates its rules with federal law. The permit process is structured in a manner that allows a company seeking a permit to submit only one package that will meet the requirements of all the agencies. Financial assurance for reclamation required to receive the permit will sometimes have multiple agencies as the beneficiaries. After some discussion, Mr. Brancard provided an example of uranium activities and the government entities responsible for regulating those activities. Milling and *in situ* leach (ISL) mining, which are considered as "production of uranium" rather than conventional mining, are licensed by the NRC and are exempt from the New Mexico Mining Act. However, those same activities are subject to the state's Water Quality Act and the federal Safe Drinking Water Act. Permits from the Department of Environment and others still need to be issued before a company may begin those activities.

The subcommittee expressed concerns about the scope of its task, legacy issues, the complexity and difficulty of topics and issues implicit in the New Mexico Mining Act; the need to objectively balance all interests, become educated on the entire issue and bring a comprehensive perspective; being fair to the uranium industry by not changing the rules in the middle of the game; and the health and public safety of the communities affected by uranium mining. The subcommittee instructed staff to allow any member referenced in a committee letter to review the letter before it is delivered to the intended recipient. Then the subcommittee requested that Mr. Brancard provide the committee with a flow chart of the permitting process and a list of all permit applications and their status in the permitting process. Mr. Brancard made

the subcommittee aware of two vacancies on the Mining Commission, and the subcommittee expressed a desire to have the vacancies filled with representation from various geographical areas of the state and Native Americans.

Mr. Brancard informed the subcommittee that initial baseline data are required for approval of permits and that his agency often contracts out some of that work when necessary to move a permit application faster. Additionally, he indicated that priorities are made for reclamation of the almost 1,500 abandoned mines because of the limited amount of federal funds available. For new and expanded mining, a reclamation schedule is required and a "reclaim as you go approach" is preferred. Nonetheless, a company is required to start reclamation within six months of the last mining activity, or the division will draw down the financial assurance put up by the company.

In response to questions from the subcommittee regarding the New Mexico Mining Act, Mr. Brancard addressed the sections of that act as follows:

For Section 69-36-3(G) NMSA 1978, he explained that the references to the NRC and the federal Resource Conservation and Recovery Act (RCRA) apply to materials regulated by the NRC, which include certain radioactive materials. Subtitle C of the RCRA establishes a federal program to manage hazardous wastes from cradle to grave to ensure that hazardous waste is handled in a proper manner.

For Section 69-36-3(H) NMSA 1978, he explained that the definition does not include ISL mining that is licensed by the NRC. In general, mining that is licensed by the NRC is exempt from the definition of "mining" and, therefore, from regulation under the New Mexico Mining Act. In *New Mexico Mining Comm'n v. United Nuclear Corp.*, 2002-NMCA-108 (Ct. App. 2002), cert. denied (2002), the New Mexico Court of Appeals determined that the NRC exemptions in Section 69-36-3(G) and (H) NMSA 1978 only applied to uranium mining facilities that are licensed by the NRC. Therefore, mills and ISL operations licensed by the NRC are exempt from the New Mexico Mining Act, while conventional uranium mines, such as underground and open pit that are not licensed by the NRC, are covered by that act.

For Section 69-36-4(A) NMSA 1978, he explained that mines may be subject to a number of other state laws, such as the Water Quality Act, Section 74-6-1 NMSA 1978 et seq., and the Air Quality Control Act, Section 74-2-1 NMSA 1978 et seq.

In reference to Section 69-36-7(C) NMSA 1978, and possible commission consideration to promulgate rules for ISL techniques, he explained that the New Mexico Mining Act rules do not specify requirements for a particular commodity or mining technique. There are no rules that address ISL mining, nor is the commission considering them, because the technique is not covered under the New Mexico Mining Act. If, in the future, the NRC no longer licenses this technique, the commission will adopt rules because ISL will then be covered by that act.

For Section 69-36-7(G) NMSA 1978, he explained how financial assurance requirements work in practice. Mr. Brancard indicated that each permittee must provide financial assurance to cover the costs of the performance requirements of the permit, including closure and reclamation. The cost is calculated as the cost if the work specified in the permit had to be performed by the state or a third party contractor. The state and the permittee agree on an estimate of the costs and then the permittee provides instruments, such as surety bonds, letters of credit or trust funds, to the state to cover that amount.

Mr. Brancard then reviewed the rules promulgated pursuant to Section 69-36-7(J) NMSA 1978. He noted that provisions concerning agency coordination are provided at various places in the New Mexico Mining Act rules. For example, each permit application must be sent to a number of state agencies for their review and comment. The division often establishes permit conditions based on other agency requirements.

In reference to Section 69-36-7(Q) NMSA 1978 and how the various types of financial assurance work if the applicant goes bankrupt, he explained that the financial assurance instruments are payable to the state in case the permittee defaults on its permit obligations to reclaim the mine site. The state will not release the financial instruments until the permit obligations are met. The division has a 12-year wait to ensure that all permit obligations are met. This 12-year time frame is a minimum, and other agencies that monitor other requirements or obligations under the permit may have longer waits. Bankruptcy does not relieve the company of the permit obligation. If bankruptcy triggers a default, the financial assurance instrument is paid to the state in order to perform the work. On the other hand, the company, even in bankruptcy, can continue to fulfill its obligations under the permit.

For Section 69-36-9(C) NMSA 1978, he explained that the advisory committee does exist and generally meets when the division is considering proposing any rule changes. That advisory committee met recently to review proposed changes to the exploration rules. There were several representatives of the uranium industry on that committee. In response to follow up, he indicated that before that last meeting, rule changes had not been proposed for almost two years. The last rule changes related to the schedule of fees that fund the division operations.

For Section 69-36-12 NMSA 1978, he noted that the division follows the New Mexico Mining Act standards and requirements for new mine permits, including the specific examples found at Sections 69-36-7(B), (C), (H), (I) and 69-36-9(G) NMSA 1978.

For Section 69-36-19 NMSA 1978, he explained that the New Mexico Mining Act Fund exists and contains the fees paid by permittees and applicants. There is no money from the general fund or federal appropriations in that fund. That fund is used to pay the entire cost of administering the New Mexico Mining Act program at the Energy, Minerals and Natural Resources Department as required by Section 69-36-7(M) NMSA 1978.

Overview of the Water Quality Act

Marcy Leavitt, director for the Water and Waste Management Division of the Department of Environment, began her presentation by providing a time line of the Water Quality Act. The significant activity and years are as follows:

1967 Water Quality Act adopted;
1973 Water Quality Act amended to include permitting authority;
1977 discharge permit regulations adopted;
1993 Water Quality Act amended to allow financial assurance regulations to be adopted;
1995 abatement regulations adopted; and
1995 financial assurance regulations adopted.

Ms. Leavitt continued to explain the major duties and powers of the Department of Environment. For example, the Department of Environment certifies federal Clean Water Act permits for discharges to surface water and issues state ground water quality protection permits for operational discharges, closure activities and ground water pollution abatement at mines and other types of facilities. The Department of Environment certifies the federal National Pollutant Discharge Elimination System permits to ensure that state surface water quality standards will be met. The Department of Environment also has primacy for the federal Underground Injection Control (UIC) Program, which covers ISL mining facilities. Ms. Leavitt expounded on the significant activity presented in her time line. Operational discharges include de-watering and process fluids, tailings, leach ore, waste rock and other discharges that have the potential to affect water quality. Closure or reclamation activities include source control measures such as regrading, covering and re-vegetating piles and impoundments and dismantling of catchment basins that have stored contaminated fluids, in order to protect water quality into the future. Financial assurance is required to ensure that closure activities can be implemented. Abatement activities include pumpback systems to control the spread of contaminated ground water, ground water remediation systems and water treatment operations. She highlighted that the Department of Environment coordinates with the Mining and Minerals Division to ensure that closure activities are designed to both protect water quality and meet the requirements of the New Mexico Mining Act. The Department of Environment implements state responsibilities under the federal Superfund Program. The department has assumed a lead role for several Superfund sites, and conducts Superfund investigations and oversight.

Ms. Leavitt also informed the subcommittee that the Water Quality Act (WQA) created the Water Quality Control Commission (WQCC), which is now a 14-member commission with responsibility for regulation and standards adoption and review of permitting decisions and enforcement decisions. The WQA also creates the framework for the state's ground water protection program that is codified as the WQCC regulations. Then, she provided a comprehensive overview of the WQCC rules that cover ground water protection and the remediation program. Section 1000 contains the general provisions that require notice of intent to discharge and notification of spills and unpermitted discharges. Section 2000 concerns surface water protection and contains the general provisions for surface water quality protection. Section 3000 covers the permitting, including discharge requirements, and ground water standards for protection of human health and irrigation uses. Discharge permits for mine sites

include operational, monitoring, closure and financial assurance requirements. Section 4000 covers the abatement requirements, including requirements for abatement of ground water and surface water contamination, and provisions for technical infeasibility and alternative abatement standards. Alternative abatement standards are a variance from the requirement to meet the state's numerical ground water quality standards. The variance procedure is available when abatement is not technically or economically feasible. Section 5000 covers UIC regulations. UIC requirements are added to discharge permits for UIC wells. ISL is covered by Class III well requirements. This section also includes requirements for injection well construction. Section 5103 discusses the "designated aquifer" process that is similar to the federal "aquifer exemption" process.

In response to a subcommittee inquiry, Ms. Leavitt explained that the state has taken a different approach than many other states with greater rainfall in regards to protecting aquifers. In New Mexico, all aquifers with less than 10,000 solid parts per million are protected, including for future use. Currently, there are no applications for an ISL permit submitted to the state. Ms. Leavitt said she is aware of the federal Environmental Protection Agency dealing with a permit on Navajo land, but she is unaware of the status of that application. The subcommittee expressed concern about the lack of a formal process between the tribes and the state to ensure protection of common aquifers.

The subcommittee also expressed concern over the lack of data and resources of state agencies to gather data in a timely manner. Members of the panel indicated that there is some data and mapping of the aquifers in the area; however, the data are not detailed in certain areas. The data have come from existing wells, such as private irrigation wells, livestock wells and wells located in past mining areas to monitor contamination. No new wells are being proposed to gather data. Ms. Leavitt indicated that in areas that are already above the standards allowed by the state because of past mining activity, a determination of baseline data needs to be made. The determination will be made by collecting data from wells around the affected area to determine what the natural levels should be. Currently, the mining companies that would like to start new mining operations in these affected areas will be required to bring the contamination levels to the current levels after their mining has been completed. The companies that conducted the past mining activities will be required to bring the levels back down to the natural levels of the aquifer. The need for the relevant data was again noted and highlighted by the subcommittee and panel members.

Upon inquiry from the subcommittee, further explanation of the current data was provided. The standard used by the state is .03 milligrams per liter of uranium for drinking water. In areas affected by past mining, levels of contaminates are as high as 10 milligrams per liter of uranium and decreases the further away the well is located from the mining activity. In aquifers where proposed ISL mining is to take place and where no past mining activity has occurred, such as in Crownpoint and Churchrock, levels of contaminates are as low as .001 milligrams per liter of uranium. The contamination of nearby areas was due in part to the lack of rules and regulations to prevent leaks and runoff during past mining operations. Ms. Leavitt concluded by acknowledging that the subcommittee wanted assurances that, if permits are given, the new

mining operations of uranium would be done in a safe manner and reclamation could restore contamination to original levels. Unfortunately, Ms. Leavitt could not provide that assurance, and only stated that it would be done relatively safer than in the past.

Applicability of Existing State Law to New Uranium Mining Techniques

Douglas M. Bland, special projects manager of the Bureau of Geology and Mineral Resources of the New Mexico Institute of Mining and Technology, joined the other two presenters. All three presenters came to a consensus that there are no major gaps in the relevant law dealing specifically with uranium mining. Public interaction in the issuance of permits is a major component of the law and rules. The agencies provide legal advertisements, direct mailings, opportunity to receive notification of certain applications and notice of public hearings. In response to questions from the subcommittee, Mr. Brancard indicated that his division is always looking to improve the public notice process and could recall at least one instance in which public comments resulted in the denial of a permit application. Mr. Brancard also indicated that only 19 small new mining operations have been given permits and about 70 existing mining operations were given expansion permits since the New Mexico Mining Act went into effect. There have been numerous exploration permits issued. The discussion once again centered around the available baseline data and the requirements for reclamation of the areas affected by existing mining operations. In response to questions from the subcommittee, the presenters indicated that, at this time, they would not want to seek any additional primacy or duties now regulated by the federal government because those duties do not come with any federal funding to carry out those duties. Mr. Bland indicated that funding for the New Mexico Institute of Mining and Technology for a study would be beneficial to collect and gather baseline data for new mining requirements. Mr. Brancard indicated that the permittees currently cover the cost of any data required for the issuance of any permits, as well as any special costs. The Mining and Minerals Division takes adequate steps to ensure that the data are not biased, such as contracting directly with third parties. Ms. Leavitt concluded that, currently, the law and rules are implemented to ensure protection of future resources, as well as the reclamation of past resource contamination.

Discussion of Revisions to Existing State Laws Affecting Uranium Mining

Representative Lundstrom began the discussion by reiterating the issues of concern expressed by the subcommittee during the meeting. These concerns included the following:

1. seek immediate appointment of public members of the WQCC that shall reflect the geographic diversity of New Mexico;
2. seek immediate appointment of the full complement of public members of the Mining Commission, one of whom should be a Native American;
3. follow up on the requests to the presenters;

4. support an appropriation request in the 2009 legislative session for funding for fiscal year 2010 for a comprehensive study of uranium-related contamination of aquifers in the San Mateo Basin;
5. continue the study of statutory and regulatory changes that may be necessary to protect New Mexico's natural resources from adverse environmental impacts that could result from the implementation of new uranium mining techniques in New Mexico, and to advise the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department on continuing efforts to clean up abandoned uranium mine sites in New Mexico;
6. request tribal entities in New Mexico to adopt policies requiring consultation with state government when tribal activities may affect lands and persons beyond the boundaries of tribal lands;
7. consider ISL permit primacy for the state;
8. deal with legacy site issues and reclamation and provide funding for baseline data; and
9. deal with discharge permits and impacts on the aquifers.

During discussion regarding the subcommittee's concerns, members focused on: the appointment of public members of the two commissions to represent various viewpoints; consultation with the tribes concerning uranium mining; a comprehensive approach to address all concerns; health assessment of the affected areas; and working with the agencies and the Governor's Office to address the cleanup of legacy sites through legislation.

At the conclusion of the subcommittee meeting, the members voted without opposition to recommend that the Indian Affairs Committee take the following steps:

1. amend the WQA so that the appointment of public members of the WQCC shall reflect the geographic diversity of New Mexico;
2. write a letter to Governor Bill Richardson, with a copy to Lieutenant Governor Diane Denish, requesting the appointment of the full complement of public members of the Mining Commission, one of whom should be a Native American;
3. work with the Office of the Governor to draft a proposed uranium legacy cleanup act that would not be vetoed if passed by the legislature in 2009;
4. support an appropriation request in the 2009 legislative session for funding for fiscal year 2010 for a comprehensive study of uranium-related contamination of aquifers in the San Mateo Basin;
5. request New Mexico Legislative Council approval for per diem and travel expenses for members of the interim Indian Affairs Committee and Radioactive and Hazardous Materials Committee to travel to Washington, D.C., following the 2009 legislative session to meet with New Mexico's congressional delegation regarding federal financial assistance for the cleanup of abandoned uranium mines in New Mexico;
6. support a memorial and accompanying appropriation request in the 2009 legislative session requesting the appointment of a technical task force during the 2009 interim to continue a study of statutory and regulatory changes that may be necessary to protect New Mexico's natural resources from adverse environmental impacts that could result from the

implementation of new uranium mining techniques in New Mexico, and to advise the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department on continuing efforts to clean up abandoned uranium mine sites in New Mexico; and

7. support a memorial in the 2009 legislative session requesting tribal entities in New Mexico to adopt policies requiring consultation with state government when tribal activities may affect lands and persons beyond the boundaries of tribal lands.

Adjournment

There being no further business before the subcommittee, the first meeting of the New Mexico Mining Act Subcommittee of the Indian Affairs Committee for the 2008 interim was adjourned at 3:15 p.m.